

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Christopher Conway	Team: Squad #15	CCRB Case #: 201507073	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Friday, 08/14/2015 3:55 AM	Location of Incident: § 87(2)(b)	Precinct: 77	18 Mo. SOL 2/14/2017	EO SOL 2/14/2017	
Date/Time CV Reported Fri, 08/14/2015 3:59 AM	CV Reported At: IAB	How CV Reported: Phone	Date/Time Received at CCRB Fri, 08/21/2015 11:20 AM		

Complainant/Victim	Type	Home Address
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)

Witness(es)	Home Address
§ 87(2)(b)	§ 87(2)(b)
§ 87(2)(b)	§ 87(2)(b)

Subject Officer(s)	Shield	TaxID	Command
1. POM Gerard Cash	18279	951594	PBBN SU
2. POM Konrad Zakiewicz	13914	945127	PBBN SU

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POF Kimberly Huacon	07764	949869	PBBN SU

Officer(s)	Allegation	Investigator Recommendation
A.POM Gerard Cash	Abuse: PO Gerard Cash stopped § 87(2)(b)	§ 87(2)(b)
B.POM Gerard Cash	Abuse: PO Gerard Cash frisked § 87(2)(b)	§ 87(2)(b)
C.POM Konrad Zakiewicz	Abuse: PO Konrad Zakiewicz frisked § 87(2)(b)	§ 87(2)(b)
D.POM Gerard Cash	Abuse: PO Gerard Cash searched § 87(2)(b)	§ 87(2)(b)
E.POM Konrad Zakiewicz	Abuse: PO Konrad Zakiewicz searched § 87(2)(b)	§ 87(2)(b)
F.POM Gerard Cash	Abuse: PO Gerard Cash entered and searched § 87(2)(b) in Brooklyn.	§ 87(2)(b)
G.POM Gerard Cash	Abuse: PO Gerard Cash issued a summons to § 87(2)(b)	§ 87(2)(b)

Case Summary

This case is over 90 days old. This case was received by the CCRB a week after it was filed with the NYPD's Internal Affairs Bureau and the complainants rescheduled one appointment and missed another appointment before being interviewed on September 11, 2015, almost a month after the case was filed. Officer interviewed were completed by October 22, 2015. Since, the closing report went through several layers of review.

On August 14, 2015, § 87(2)(b) filed this complaint by phone with 911, who forwarded her call to the NYPD's Internal Affairs Bureau Command Center, generating original log #15-23537. This case was received by the CCRB on August 21, 2015, under log #15-23973.

At approximately 3:55 a.m. on August 14, 2015, § 87(2)(b)'s son § 87(2)(b) was standing outside their home at § 87(2)(b) in Brooklyn when an unmarked RMP containing PO Gerard Cash, PO Konrad Zakiewicz, and PO Kimberly Huacon of Patrol Borough Brooklyn North Specialized Unit, pulled up and stopped in front of the building. § 87(2)(b) went inside his building's common hallway and PO Cash followed and stopped him there (**Allegation A**). § 87(2)(b) alleged that both PO Cash and PO Zakiewicz frisked and searched him (**Allegations B through E**). PO Cash then knocked on the door to § 87(2)(b), bringing § 87(2)(b) to the door. PO Cash entered and searched § 87(2)(b) (**Allegation F**), and § 87(2)(b) called 911 to report that officers had entered her apartment without consent. PO Cash exited the apartment and issued § 87(2)(b) a summons for § 87(2)(b) (**Allegation G**), and officers then left the scene.

Mediation, Civil and Criminal Histories

- On August 24, 2015, § 87(2)(b) was offered mediation as an alternative to resolve this complaint, but she rejected this § 87(2)(b)
 - A FOIL request returned by the Office of the New York City Comptroller indicates that as of September 23, 2015, neither § 87(2)(b) nor § 87(2)(b) have not filed a notice of claim in regards to this incident (encl. 15 Board Review).
 - § 87(2)(b)
 - § 87(2)(b)
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Civilian and Officer CCRB History

- This is the first complaint filed by § 87(2)(b) with the CCRB, and the first in which § 87(2)(b) is a victim (encl. 16 Board Review).
- PO Cash has no substantiated allegations against him in his three-year tenure with the New York City Police Department. § 87(2)(g)

- PO Zakiewicz has no substantiated allegations against him in his eight-year tenure with the New York City Police Department. § 87(2)(g)

Attempts To Obtain Video Footage

On August 25, 2015, contact letters were mailed to every apartment in § 87(2)(b), including the apartment of landlord § 87(2)(b) (identified through a search on NYCMaps). A CLEAR database search for a phone number for § 87(2)(b) or further contact information performed on August 27, 2015, was negative.

During her interview, § 87(2)(b) provided § 87(2)(b) phone number. On September 16, 2015, a phone call was placed to § 87(2)(b) who stated he will confer with his unidentified daughter who deals with the building's video surveillance system, and will call back as soon as possible. § 87(2)(b) did not call back. Between September 25, 2015, and October 2, 2015, four additional phone calls were placed to § 87(2)(b) and a second contact letter was mailed to § 87(2)(b) and voicemails were left in all calls. § 87(2)(b) did not respond to any of the contact attempts. On October 19, 2015, the last letter sent to § 87(2)(b) was returned to the CCRB by the United States Postal Service as "undeliverable." As such, the investigation was unable to get in contact with § 87(2)(b) to obtain any potential footage for this incident.

Finding and Recommendations

Recommendations

Allegation A—Abuse of Authority: PO Gerard Cash stopped § 87(2)(b)

§ 87(2)(b) was smoking a cigarette outside of § 87(2)(b) when an unmarked car containing PO Cash, PO Zakiewicz, and PO Huacon pulled up. When the car stopped, § 87(2)(b) went inside the building, and the officers exited and ran after him. He decided to go inside the building because he lives in a dangerous neighborhood and it seemed "fishy" that a car would stop (statement encl. 03 Board Review). When the officers emerged, § 87(2)(b) saw shields around their necks, recognized them as the police, and held the door of the building open for them to enter. § 87(2)(b) alleged that the officers "screamed" words he could not recall, and that he was handcuffed by PO Cash and PO Zakiewicz.

PO Cash was seated in the front passenger's seat with the windows down as they drove westbound on St. Johns Place. PO Cash observed § 87(2)(b) leaning against a parked car facing the officers with a cloud of smoke emanating from § 87(2)(b) and the growing smell of marijuana as the vehicle drove closer to him (statement encl. 06 Board Review). PO Cash stated that § 87(2)(b) was the only individual standing outside. PO Cash observed § 87(2)(b) from the distance of approximately five feet through the window nearest to § 87(2)(b) though the view was partially blocked by a parked car. PO Cash did not observe § 87(2)(b) exhaling smoke from his mouth or holding any marijuana paraphernalia. Upon PO Cash exiting the car and seeing more clearly over the parked car, § 87(2)(b) was holding an opaque black plastic shopping bag that looked like it was heavy or weighted, and possibly containing a weapon that PO Cash could not specify. PO Cash was unable to describe the shape of the bag. Upon stopping the RMP, § 87(2)(b) ran inside and entered the back apartment; PO Cash indicated these were the reasons he initially got out and ran after § 87(2)(b) and when he encountered § 87(2)(b) in the hall § 87(2)(b) said in sum and substance, "It's not a gun, I was just smoking weed." PO Cash stated he ran past § 87(2)(b) towards the apartment, and did not see if he was cuffed or what became of him.

PO Zakiewicz corroborated smelling marijuana and seeing the plastic bag that he felt was suspicious, but made no mention of the cloud of smoke (statement encl. 07 Board Review). PO Zakiewicz also stated that § 87(2)(b) was standing with an unknown female. PO Zakiewicz

stated that § 87(2)(b) was holding the bag abnormally, not by the handles but by the bulky middle of the bag. PO Zakiewicz was unable to describe the shape of the bag but believed it possibly contained a knife or gun, due to its heft and the way in which § 87(2)(b) was holding it.

PO Huacon testified that PO Zakiewicz stopped the car abruptly and then she saw § 87(2)(b) running up the stairs into the building. PO Huacon did not see anyone else on the street. Upon entering the building, PO Huacon described § 87(2)(b) as irate and shouting. PO Huacon did not smell the marijuana at the time of the initial stop, and at no point of this incident saw § 87(2)(b) in possession of the black plastic bag (statement encl. 08 Board Review).

A stop requires reasonable suspicion that the individual has committed, is committing, or is about to commit a crime. People v. DeBour, 40 N.Y.2d 210 (1976) (encl. 11 Board Review). Furthermore, People v. Cornelius 113 A.D.2d 666 (1986) (encl. 20 Board Review) holds that just seeing a “bulky” or “weighted” object in a person’s pocket is not enough for reasonable suspicion for a stop.

§ 87(2)(g)

§ 87(2)(g)

Allegation B—Abuse of Authority: PO Gerard Cash frisked § 87(2)(b)

It is undisputed that § 87(2)(b) was frisked by at least one officer in the common hallway of his building during this incident.

§ 87(2)(b) alleged that immediately upon encountering the officers in the hallway, he was allegedly frisked by both PO Cash and PO Zakiewicz.

PO Huacon acknowledged that § 87(2)(b) was frisked, but could not recall which officer or how many officers performed this action. PO Huacon specifically could not answer for either officer as she alleged that she did not see anything that PO Cash or PO Zakiewicz did despite being in the same hallway at close quarters with them. Though PO Huacon could not recall who performed the frisk, she offered the rationale that § 87(2)(b) was frisked because he was in close quarters with police officers and they had to insure he did not have a weapon. PO Huacon attested that there were no other factors behind the frisk.

PO Cash did not recall any frisk, but he also said that he walked straight past § 87(2)(b) to apartment 1L to investigate the location of the black plastic shopping bag. PO Cash denied that he frisked § 87(2)(b).

When asked during his CCRB statement if he frisked § 87(2)(b) PO Zakiewicz replied, “Possibly, I don’t remember if it was me or somebody else.” PO Zakiewicz did not allege that PO Cash frisked § 87(2)(b).

§ 87(2)(g)

Allegation C—Abuse of Authority: PO Konrad Zakiewicz frisked § 87(2)(b)

As discussed above, it is undisputed that § 87(2)(b) was frisked by at least one officer in his hallway during this incident.

§ 87(2)(b) alleged that immediately upon encountering the officers in his hallway, he was frisked by PO Cash and PO Zakiewicz all over his body. When asked if he frisked § 87(2)(b) PO Zakiewicz replied, “Possibly, I don’t remember if it was me or somebody else.” When asked further about the rationale behind the frisk, PO Zakiewicz revised his remark and said, “I don’t remember.”

A frisk requires reasonable suspicion that an individual is armed. People v. DeBour, 40 N.Y. 2d 210 (1976) (encl. 11 Board Review). People v. Cornelius, 113 A.D.2d 666 (1986) (encl. 20 Board Review) holds that just seeing a “bulky” or “weighted” object in a person’s pocket is not enough for reasonable suspicion for a stop.

§ 87(2)(g)

§ 87(2)(g)

Allegation D—Abuse of Authority: PO Gerard Cash searched § 87(2)(b)

Allegation E—Abuse of Authority: PO Konrad Zakiewicz searched § 87(2)(b)

§ 87(2)(b) alleged that immediately after being allegedly frisked by PO Cash and PO Zakiewicz, these same officers allegedly inserted their hands into his pants pockets.

All officers denied that they conducted a search, observed a search, or were informed by another officer that a search of § 87(2)(b) was conducted.

None of the civilian witnesses to this incident were observing the scene of this alleged search, and there was no video footage that could be obtained to serve as independent corroboration to confirm or deny the allegation.

§ 87(2)(g)

Allegation F—Abuse of Authority: PO Gerard Cash entered and searched § 87(2)(b)

in Brooklyn.

It is undisputed that PO Cash knocked on the door to § 87(2)(b) and when § 87(2)(b) answered the door, PO Cash entered her apartment.

§ 87(2)(b) alleged that when she opened the door to ask who was searching her belongings in the hallway and making noise, PO Cash shoved his way in by pushing the door open and walking past her (phone statement encl. 01 Board Review, verified statement encl. 02 Board Review). She braced herself to try and stop him because she did not consent to the entry, but was too weak to offer resistance due to a recent surgery. PO Cash searched closed containers in her hallway and daughter’s empty bedroom (such as boxes of clothes), and refused § 87(2)(b)’s demands to leave. § 87(2)(b) called 911 to complain and to demand that a police supervisor to come to the scene, and this seemed to make PO Cash nervous, as he left shortly after.

§ 87(2)(b) corroborated seeing PO Cash make entry into the apartment, but due to his position detained at the fore of the hallway he could not see what happened inside.

§ 87(2)(b) stated he got out of bed to observe PO Cash searching through the apartment while § 87(2)(b) held the door so that another officer could not make entry (statement encl. 04 Board Review).

PO Cash testified that § 87(2)(b) willingly allowed him to enter after he knocked on her door and asked to speak with her, stepping aside and saying no word in protest to his entry. PO Cash said he calmly spoke to § 87(2)(b) about the situation with § 87(2)(b) outside, while visually inspecting the foyer. PO Cash denied he opened any closed containers or any of the rooms inside of the apartment. At a certain point, § 87(2)(b) became upset and uncooperative; however, she never demanded that he leave. PO Cash could not provide any reason or context for why § 87(2)(b) got angry and upset. PO Cash left of his own free will, and § 87(2)(b) never tried to close the door on him or any officer. § 87(2)(b)'s call to 911 to protest PO Cash's presence in her apartment took place while PO Cash was still inside her apartment.

Police communications records indicate that § 87(2)(b) called 911 at 4:00 a.m. and stated that officers were illegally searching her apartment with no warrant, and she needed a supervisor on scene. A male voice can be heard on the recording saying, "Stop trying to close the door on me" (911 call encl. 09 Board Review; IAB call immediately after 911 call encl. 10 Board Review). When played the audio of the 911 call, PO Cash had no recollection of any part of it.

PO Zakiewicz and PO Huacon stated they did not observe and thus could not corroborate any part of the above events.

People v. Whitehurst 25 N.Y.2d 389 (1969) (encl. 19 Board Review) holds that when an officer uses consent as a basis for a search or intrusion, they are under a heavy burden to prove that consent was given.

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

Allegation G—Abuse of Authority: PO Gerard Cash issued a summons to § 87(2)(b)

It is undisputed that § 87(2)(b) was issued a disorderly conduct summons at 4:05 a.m. for disorderly conduct due to shouting and screaming on a public sidewalk causing public disorder. The summons was issued by PO Cash.

§ 87(2)(b) made no mention of shouting or screaming, and generally speaking he denied that he had done anything to merit being charged with disorderly conduct.

It is unknown why the summons indicated that the offense occurred on a sidewalk. When presented with a copy of the summons, PO Cash could not read his own handwriting, but conclusively said that the disorderly conduct only pertained to § 87(2)(b) shouting and

screaming while inside the common hallway to § 87(2)(b), which caused less than five tenants to stick their heads out of their apartment doors to see what was going on. § 87(2)(b) was asked to stop by an officer that PO Cash could not recall (PO Huacon alleged she was the one who told § 87(2)(b) to stop screaming), and thus PO Cash issued § 87(2)(b) a summons for disorderly conduct.

§ 87(2)(b) denied that her son was screaming; she alleged that the first noise she heard outside was PO Cash rummaging through her shoeboxes outside. According to § 87(2)(b) the first thing that § 87(2)(b) said was when he exclaimed, “Leave my mom alone,” upon PO Cash’s entry. Apart from this exclamation, § 87(2)(b) did not corroborate officers’ accounts of screaming and disorderly conduct in the hallway.

Neither § 87(2)(b) nor § 87(2)(b) (a neighbor who was arriving home from his job around the time of the incident, statement encl. 05 Board Review) corroborated officers’ accounts of screaming and disorderly conduct in the hall.

The IAB intake CD depicts clearly the officers speaking to § 87(2)(b) and tellingly does not depict any screaming or shouting in the background.

New York State Penal Code § 240.20 defines disorderly conduct as when an individual with intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof, makes unreasonable noise in a public place (among other versions of offenses against the public order)(encl. 13 Board Review).

People v. Baker 20 N.Y.3d 354 (2013) (encl. 18 Board Review) and People v. Square 20 Misc. 3d 1126(A) (2008) (encl. 21 Board Review) both hold that to constitute disorderly conduct, the offense has to happen in public, not inside a private apartment building. Furthermore, Baker finds that the defendant has to intend to create a threat to public safety by their conduct, and just because spectators are watching is not enough.

§ 87(2)(g)

§ 87(2)(g)

Team: _____

Investigator: _____
Signature Print Date

Supervisor: _____
Title/Signature Print Date

Reviewer: _____
Title/Signature Print Date

Reviewer: _____
Title/Signature Print Date